

**STATE OF MICHIGAN
IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

v.

MARK DAVID SESSIONS,

Defendant/Appellant.

Case No. 126514

COA No. 251836

Livingston CC Case No. 03-13545-AR

53rd DC Case No. 03-0293-FY

**PLAINTIFF/APPELLEE'S BRIEF IN OPPOSITION TO
APPLICATION FOR LEAVE TO APPEAL**

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF JURISDICTIONAL BASIS

The People concur in Defendant's statement of jurisdiction.

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COUNTER-STATEMENT OF QUESTION INVOLVED

Does the phrase “successfully completed all conditions of probation” contained in MCL 750.224f require a convicted felon to complete probation without violating any of the conditions of that probation in order to lawfully possess a firearm?

The People answer: Yes

Defendant answers: No

The Court of Appeals: Yes

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COUNTER-STATEMENT OF FACTS

The facts are uncontested and were stipulated to at the preliminary examination. Defendant was found in possession of a firearm on February 9, 2003, and was charged with Felon in Possession of a Firearm¹ and Domestic Violence.² The Felon in Possession charge was predicated on Defendant's March 19, 1993 guilty plea to three separate felony charges of Breaking and Entering a Building With Intent to Commit Larceny, MCL 750.110.³ He was subsequently placed on a three year probationary term. On March 3, 1995, Defendant pled guilty to violating his probation and was continued on probation. *See* Preliminary Examination Exhibit 2. Ultimately, Defendant was discharged from probation on April 23, 1996. In the petition requesting the discharge, the probation officer included the sentence: "Defendant has complied with the [sic] terms and conditions of probation." *See* Preliminary Examination Defendant's Exhibit A.

The Felon in Possession statute provides:

Except as provided in subsection (2), a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until the expiration of 3 years after all of the following circumstances exist:

- (a) The person has paid all fines imposed for the violation.
- (b) The person has served all terms of imprisonment imposed for the violation.
- (c) The person has successfully completed all conditions of probation or parole imposed for the violation.

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¹MCL 750.224f.

²MCL 750.81.

³The maximum sentence on those charges was ten years.

MCL 750.224f(1).⁴ Accordingly, unless a convicted felon has complied with all three requirements, he is ineligible to possess a firearm. Three years had expired after Defendant had paid all fines and served all terms of imprisonment. The only issue was whether Defendant had “successfully completed all conditions of probation” under subsection (c).

Defendant argued that because the *petition* of the probation officer for discharge from probation stated that “Defendant has complied with the [sic] terms and conditions of probation,” Defendant had complied with the statute and was eligible to possess a firearm. The People argued that Defendant had pleaded guilty to violating probation, had not successfully completed *all conditions* of probation, and thus, was still prohibited from possessing a firearm as he had not met all the conditions for eligibility to possess a firearm contained in MCL 750.224f(1). The District Court rejected the People’s argument without comment and dismissed the charge. The misdemeanor Domestic Violence charge was retained in District Court for further proceedings. The District Court granted a stay pending appeal.

On appeal, the Livingston County Circuit Court affirmed the decision of the District Court and the People filed an application for interlocutory appeal with the Court of Appeals. The application was granted and the Court of Appeals, in a 2-1 published opinion, agreed with the People’s reading of MCL 750.224f and reinstated the felon in possession of a firearm charge. *People v Sessions*, 262 Mich App 80; 684 NW2d 371 (2004).

Defendant filed an application seeking review by this Court. On December 27, 2004, this Court directed that the application be scheduled for oral argument.

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⁴“Felony” is narrowly defined as a violation of law which “is punishable by imprisonment for 4 years or more, or an attempt to violate such a law.” MCL 750.224f(5).

ARGUMENT

MCL 750.224f REQUIRES A CONVICTED FELON TO SUCCESSFULLY COMPLETE ALL CONDITIONS OF PROBATION IN ORDER TO POSSESS A FIREARM.

Standard of Review

This Court has clearly and repeatedly articulated the standard of review in the area of statutory interpretation:

We review questions of statutory construction de novo. In doing so, our purpose is to discern and give effect to the Legislature's intent. We begin by examining the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed--no further judicial construction is required or permitted, and the statute must be enforced as written. We must give the words of a statute their plain and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain the Legislature's intent.

People v Morey, 461 Mich 325, 329-330; 603 NW2d 250 (1999)(internal citations omitted).

This Court went on to explain how the plain meaning of a statute is determined:

we consider not only the meaning of the phrase itself, but also "its placement and purpose in the statutory scheme."... "The fair and natural import of the terms employed, in view of the subject matter of the law, is what should govern," and as far as possible, effect must be given to every word, phrase, and clause in the statute.

Id. (internal citations omitted).

Discussion

This case involves a pure issue of statutory construction. MCL 750.224f(1) unambiguously prohibits a convicted felon from possessing a firearm unless they have "successfully completed all conditions of probation..." Despite Defendant's violation of a condition of his probation, the District Court found that Defendant met the final element by

completing his probationary term.⁵ Defendant continues to misread the statute by focusing only on the words “successfully completed” and “probation” while ignoring the significance and meaning of the words “all conditions.”

There can be no question that Defendant violated a *condition* of his probation. The District Court was provided with a certified copy of a Judgment from the Circuit Court stating that Defendant had pled guilty to a probation violation. *See* Preliminary Examination Exhibit 2. Defendant counters that, after the probation violation, Defendant subsequently successfully completed the conditions of his probation as evidenced by a statement in the order discharging him from probation. *See* Preliminary Examination Defendant’s Exhibit A. Defendant’s argument acknowledges the commission of a violation of a condition of probation, but then submits that the probation discharge petition somehow made the earlier violation of a condition of probation a nullity.⁶ The statement in the discharge petition by the probation officer that he “complied with the [sic] terms and conditions of probation” after his violation, does nothing to change the fact that Defendant *did* violate a condition of probation.

The relevant inquiry is the meaning of the phrase “successfully completed all conditions of probation.”⁷ Giving each word of the statute meaning, it means exactly what it says: a convicted felon must successfully complete *all conditions* of probation, and not, as

⁵Whether the exception to criminal liability is an element of the crime or one which Defendant must establish is before this Court in *People v Perkins*, ___ Mich ___; 688 NW2d 510 (November 4, 2004)(Docket No 126727).

⁶Contrary to the Court of Appeals opinion at footnote two, the statement that Defendant had complied with the conditions of probation was contained in the *petition* and not the *order*. Furthermore, Defendant’s performance on probation *after* the violation *was* satisfactory.

⁷This phrase also appears in subsection (2)(a)(iii) of the statute.

Defendant urges this Court, just be successfully discharged from probation.⁸ Defendant's interpretation of the statute would be more compelling had the Legislature left out the words "all conditions of" and simply said "complete probation" or wrote subsection (c) to read that "[t]he person has been discharged from probation or parole." But the insertion of the phrase "all conditions" represents a deliberate legislative choice which cannot be ignored.

Understanding the significance of the plain meaning of the words of the statute is easier when compared to other areas where the Legislature has acted. For example, it cannot be suggested that the Legislature meant to equate violating a *condition* of probation with *revocation* of probation. That the Legislature understood the difference between the two concepts is made clear in a statute discussing probation in stalking cases: "The probation is subject to revocation for any violation of a condition of that probation." MCL 771.2a(2). The Legislature understood that a violation of a probation condition does not necessarily lead to revocation. Had the Legislature intended to require that probation be terminated or revoked to preclude eligibility to possess a weapon under MCL 750.224f, it knew how to do so and could have easily said so. For example, the Youthful Trainee Act (YTA) specifies the conditions which must be met to obtain a dismissal:

If consideration of an individual as a youthful trainee *is not terminated and the status of youthful trainee is not revoked* as provided in section 12 of this chapter, upon final release of the individual from the status as youthful trainee, the court shall discharge the individual and dismiss the proceedings.

MCL 762.14(1)(emphasis added). Thus, had the Legislature desired to make the *revocation*

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⁸There is nothing in the probation statute or court rules which requires that a discharge from probation be "with improvement" or "without improvement" or any other descriptive modifier. A probationer is either discharged or not.

of probation or parole the condition precedent to restoration of the right of a convicted felon to possess a firearm, the Legislature could have simply said in subsection (c) that “[t]he person’s probation or parole was not revoked.” But the Legislature used the term “all conditions” to specify *what* must be successfully completed. “[E]ffect must be given to every word, phrase, and clause in the statute.” *Morey, supra* at 330.

Similarly, the provision in MCL 769.4a(2) governing the deferral of proceedings for a Domestic Violence plea provides language similar to the Felon in Possession statute: “Upon a violation of a term or condition of probation, the court may enter an adjudication of guilt and proceed as otherwise provided in this chapter.” In addition, MCL 333.7411(1) also speaks in terms of conditions of probation: “Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the individual and dismiss the proceedings.” Had the Legislature meant to require only the successful completion of probation under the felon in possession statute, the Legislature could have drafted the statute in such a manner to avoid prohibiting convicted felons who had violated a condition of probation from possessing firearms. They, however, did not do so and the courts should not rewrite the statute to delete “all conditions.”

Defendant claimed in the lower court that construction of this statute should be analogous to the construction given the language “faithfully performed all of the conditions and obligation of his parole for the period of time fixed in such order...” contained in MCL

791.242.⁹ In *Wayne County Prosecutor v Department of Corrections*, 242 Mich App 148; 617 NW2d 921 (2000), the prosecutor argued that this language divested the Department of Corrections of jurisdiction to discharge a parolee from parole if the parolee had ever violated a condition of parole. While this position may seem superficially consistent with the position argued by the People in *this* appeal, the statutory language in the parole discharge statute is different from that used in the Felon in Possession statute. In rejecting the construction urged by the Wayne County Prosecutor, the Court of Appeals noted that the language specifying that discharge could be granted only if the parolee “faithfully performed all of the conditions and obligations of his parole” was specifically modified by the phrase “for the period of time fixed in such order....” From this language in *Wayne County Prosecutor*, the Court of Appeals concluded that “the Legislature must have intended that a prisoner’s compliance with the terms of each parole order be considered independently.” *Id.* at 156. But unlike the parole discharge statute, no such distinction is drawn in the Felon in Possession statute: it speaks of the successful performance of *all* conditions of probation, not simply the latest ones imposed or continued after a violation. Thus, contrary to Defendant’s suggestion, *Wayne County Prosecutor* compels the result reached by the Court of Appeals in *this* case.

Contrary to Defendant’s claim, probation is not successful simply because the

⁹MCL 791.242 states, in full: “When any paroled prisoner has faithfully performed all of the conditions and obligations of his parole for the period of time fixed in such order, and has obeyed all of the rules and regulations adopted by the parole board, he shall be deemed to have served his full sentence, and the parole board shall enter a final order of discharge and issue to the paroled prisoner a certificate of discharge. No parole shall be granted for a period less than 2 years in all cases of murder, actual forcible rape, robbery armed, kidnapping, extortion, or breaking and entering an occupied dwelling in the night time except where the maximum time remaining to be served on the sentence is less than 2 years.”

probation period is completed.¹⁰ Unlike the parole discharge statute, which requires successful completion of the most recent parole order before a discharge is granted, discharge from probation is not predicated upon a successful completion of its conditions, but simply the termination of the probationary term. *See* MCL 771.5(1).¹¹ Nothing in the probation statute provides that satisfactory performance of all conditions of probation is a condition precedent to discharge. Nor is the entry of an order discharging a probationer from supervision a finding that the probationer has not previously violated a condition of probation. There is no legal basis for Defendant's conclusion that a probation discharge order acts as essentially an implied judicial finding, contrary to reality, that Defendant had somehow successfully completed *all* terms and conditions of his probation. Such a finding defies common sense by ignoring the previous explicit orders of the court finding Defendant guilty of violating probation and the Felon in Possession statute which requires the successful performance of *all conditions* of probation. Again, had the Legislature desired to make only the discharge from probation a condition to eligibility, they could have said so rather than specifying as a requirement

¹⁰Under the probation revocation statute, a violation of probation does not automatically lead to its revocation. MCL 771.4; *People v Pillar*, 233 Mich App 267, 270; 590 NW2d 622 (1998)(probation violation hearing consists of a factual determination that the defendant violated probation and a separate determination of whether the violation warrants revocation).

¹¹"When the probation period terminates, the probation officer shall report that fact and the probationer's conduct during the probation period to the court. Upon receiving the report, the court may discharge the probationer from further supervision and enter a judgment of suspended sentence or extend the probation period as the circumstances require, so long as the maximum probation period is not exceeded."

“successfully completed all conditions of probation.”¹² Other state legislatures have drafted felon in possession statutes where the relevant consideration is the discharge from probation and *not* the satisfactory completion of all conditions of probation. For example, North Dakota law provides:

A person who has been convicted anywhere for a felony involving violence or intimidation, as defined in chapters 12.1-16 through 12.1-25, is prohibited from owning a firearm or having one in possession or under control from the date of conviction and continuing for a period of ten years after the date of conviction or *release from incarceration or probation*, whichever is latest.

ND Cent Code 62.1-02-01(1)(emphasis added). Texas has drafted its felon in possession statute in similar fashion:

A person who has been convicted of a felony commits an offense if he possesses a firearm:

(1) after conviction and before the fifth anniversary of the person's release from confinement following conviction of the felony or the *person's release from supervision under community supervision, parole, or mandatory supervision*, whichever date is later;

Tex Penal Code 46.04(a)(emphasis added). There is no reason the Michigan legislature could not have drafted its felon in possession statute in such a way if a felon's performance on probation was irrelevant.

The language of MCL 750.224f is clear and unambiguous in requiring that, for a

¹²In support of his argument that “all conditions” does not necessarily mean *all* conditions, Defendant points to a law review comment discussing California's expungement statute. A cursory review of the comment indicates that, just as Defendant disagrees as a policy matter with the Michigan felon in possession statute, the commentator is simply dissatisfied with the current state of California law which requires the fulfillment of *all* the conditions of probation for the *entire* probation period as a condition precedent to expungement. DeGonia, *Defining a Successful Completion of Probation Under California's Expungement Statute*, 24 Whittier L Rev 1077, 1083-1090 (2003)(collecting California cases that a single violation of probation will preclude relief). But Defendant's remedy for correcting any perceived unfairness with the felon in possession statute is with the Legislature.

convicted felon to be eligible to possess a firearm, he must have successfully completed *all* conditions of probation, not all except one, not successful enough to be discharged with improvement, but *all* conditions. The Court of Appeals correctly read and applied the plain language of the statute.

In the alternative, Defendant asserts that the statute is ambiguous and requires judicial construction of the type engaged in by the dissent from the Court of Appeals opinion. While the dissent concedes that the Court of Appeals opinion presents a “plausible construction” of the statutory language, the dissent does violence to the principles of statutory construction by reading the statute in such a way as to render the words “all conditions” a complete nullity:

I would conclude that the language in MCL 750.224f(1)(c) means that, once probation has been discharged, "all conditions of probation" have been "successfully completed" because there are simply no conditions remaining. That remains the case and subsection (c) remains satisfied regardless of any failure to comply with conditions of probation that might have occurred earlier, while probation was still in effect.

Sessions, supra at 87 (dissenting opinion). Under this construction, *every* probation discharge would satisfy the statute and the phrase “all conditions” would have absolutely no meaning.

As the majority recognized, however:

It is possible to give every word in MCL 750.224f(1)(c) meaning by recognizing the difference between a probationer who is discharged from probation upon successful completion of all conditions of probation and a probationer who is discharged from probation despite failing to successfully complete all conditions of probation. n4

Id. at 85. Footnote four of the Court of Appeal’s opinion properly recognizes the distinction between the two classes of persons, and thus the significance of the statutory language:

Indeed, a probationer can ultimately be discharged from probation despite a probation violation during the probationary period if a court chooses to

continue probation rather than revoke probation and impose a period of incarceration.

Id.

In addition, Defendant argues that because MCL 750.224f is a criminal statute, it should be strictly construed. But the Legislature has specifically directed that the rule of lenity does not apply:

The rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law.

MCL 750.2. *See also People v Morris*, 450 Mich 316, 327; 537 NW2d 842 (1995).

Defendant claims that the policy underlying the felon in possession statute is to give convicted felons a chance to earn back the right to possess a firearm and the statute should be construed in light of that policy.¹³ Defendant's Application at 22. But Defendant has it backwards. Prior to its enactment in 1992, a convicted felon would not have been precluded from possessing a firearm in Michigan under state law. MCL 750.224f changed that policy to preclude felons from possessing firearms except in limited circumstances. As the Court of Appeals has recognized, the statute "is aimed at protecting the public from guns in the hands of convicted felons...." *People v Swint*, 225 Mich App 353, 374; 572 NW2d 666 (1997). *See also People v Dillard*, 246 Mich App 163, 170; 631 NW2d 755 (2001), cited with approval in *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003). Subsection (c) is part of the exceptions that a felon must satisfy in order to avoid the general prohibition of the statute.

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¹³Even the dissent was unwilling to go that far and simply wrote that "[t]he 'intent' of the statute affords no assistance whatsoever in determining when or how the probation provision at issue here is to be satisfied." *Sessions, supra* at 88 (dissenting opinion).

The purpose of the statute is to protect the public, not grant rights to convicted felons. Any construction of the statute based on such a distorted view of its underlying policy, as urged by Defendant, is fundamentally flawed.

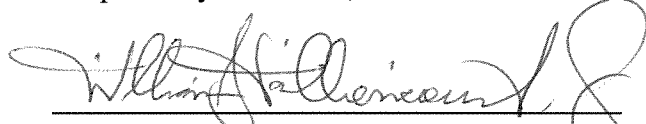
The Court of Appeals properly read and applied the felon in possession statute. No further review by this Court is necessary.

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RELIEF REQUESTED

FOR THE FOREGOING REASONS, the People request that the Court deny the Application.

Respectfully submitted,



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Dated: January 19, 2005

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